Filed 4/6/10 Essex Ins. Co. v. Professional Building Contractors CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ESSEX INSURANCE COMPANY, Plaintiff, Cross-defendant and Respondent, v. PROFESSIONAL BUILDING CONTRACTORS, INC., Defendant, Cross-complainant and Appellant.	B215005 (Los Angeles County Super. Ct. No. BC353152)

APPEAL from orders of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed in part and reversed in part and remanded.

Stanzler Funderburk & Castellon and Jordan S. Stanzler for Defendant, Cross-complainant and Appellant.

LeClairRyan, Peter M. Hart and Matthew R. Halloran for Plaintiff, Cross-defendant and Respondent.

* * * * * *

Following a jury trial on defendant and appellant Professional Building Contractors, Inc.'s (PBC) cross-complaint for bad faith against plaintiff and respondent Essex Insurance Company (Essex), as well as a court trial on Essex's declaratory relief complaint, PBC moved multiple times for attorney fees, requested an award of prejudgment interest and sought to obtain a trial on an untried cause of action. The trial court ruled against PBC in each instance.

We affirm in part and reverse in part. The trial court properly determined that PBC was not entitled to the attorney fees it sought pursuant to *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*) in view of the manner in which it stipulated it would proceed to recover those fees. The trial court also properly exercised its discretion in determining PBC was not entitled to further proceedings on its cause of action under Business and Professions Code section 17200 given its failure to request a separate trial on that claim until seven months after the jury verdict. Finally, while the trial court properly denied PBC's request for prejudgment interest running from the date PBC settled an underlying action, under Civil Code section 3287, subdivision (a), PBC was entitled to prejudgment interest running from the date of the verdict to entry of judgment. We remand the matter to enable the trial court to calculate that amount and modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND[1]

The Underlying Action.

Essex initiated a declaratory relief action against PBC in May 2006, after it agreed to defend PBC in an action filed by Gary and Susan Robinson (Robinson action) subject to a reservation of rights. PBC cross-complained against Essex, alleging causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17200, negligent

---

1 Facts relating to the origin of the dispute between PBC and Essex are set forth in detail in an unpublished opinion in a prior appeal, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B206879, filed July 21, 2009.

misrepresentation and negligence. A jury trial on PBC's cross-complaint commenced in October 2007.

By special verdict, the jury found that Essex materially breached the insurance policy and that the amount of the covered loss that Essex failed to pay was $356,264.22. It further found that Essex breached its duty to investigate, communicate and settle, and that the amount of covered loss that Essex failed to pay was $682,264.22, a sum equaling the total of the amounts sought by PBC for settlement ($250,000), repair costs to the Robinson house ($106,264.22) and attorney fees ($325,999.85). Finally, the jury found by clear and convincing evidence that Essex acted with malice, oppression or fraud. In a second trial phase on the amount of punitive damages, the jury awarded PBC $2.5 million in punitive damages.

Following the jury phase of the proceedings, the parties submitted Essex's declaratory relief complaint to the trial court for adjudication. It ruled that the damage allegedly suffered in the Robinson action constituted a covered occurrence within the terms of the insurance policy. Explaining that Essex's posttrial coverage arguments had been presented to and rejected by the jury, the trial court treated those arguments as a motion for judgment notwithstanding the verdict. The trial court determined that Essex owed a duty to defend; Essex lost its right to control the settlement of the Robinson action when it unreasonably failed to investigate and communicate and wrongfully denied coverage; and the jury's verdict necessarily determined that PBC was excused from compliance with certain policy provisions due to Essex's failure reasonably to investigate, communicate about and settle the Robinson action.

Thereafter, the trial court denied Essex's motion for judgment notwithstanding the verdict and conditionally granted Essex's motion for new trial, ruling that the motion would be denied if PBC consented to a remittitur of a one to one ratio between compensatory and punitive damages. PBC declined to consent to the remittitur and, instead, appealed from the order granting a new trial. Simultaneously, Essex appealed from the denial of its motion for judgment notwithstanding the verdict. In an unpublished opinion, *Essex Insurance Company v. Professional Building Contractors,*

Inc., case No. B206879, we affirmed, concluding that the trial court properly exercised its discretion to reduce the punitive damages award to a one to one ratio on the basis of the evidence concerning Essex's reprehensibility and the amount of compensatory damages awarded, and that the evidence supported the trial court's decision to deny Essex's motion for judgment notwithstanding the verdict.

Posttrial Motion for Additional Attorney Fees.

Shortly before trial began, PBC represented to the trial court how it intended to present its request for attorney fees pursuant to *Brandt, supra,* 37 Cal.3d 813 to the jury and the court. PBC's counsel stated that for practical purposes, it created a September 22, 2007 cutoff date. Explaining that he could not continue to create exhibits for attorney fees incurred during trial, counsel explained that PBC intended to request from the jury all fees incurred before that date and thereafter submit to the trial court any request for fees incurred thereafter. Noting that *Brandt* permits a fee request to be made either to the jury or to the trial court, PBC's counsel explained: "I'm taking a hybrid. I've got 99.9 [percent] of my fees go to the jury. One percent, I can't mechanically get them to go." With that qualification, Essex's counsel indicated that he had no objection to the hybrid procedure.

After trial, PBC moved for an award of over $250,000 in attorney fees incurred by lead counsel between September 23, and November 13, 2007, and by other law firms between June 5, 2007 and October 19, 2007. PBC asserted that the fees had been incurred to obtain policy benefits within the meaning of *Brandt* and that such request had not been previously submitted to the jury. Essex opposed the motion on the ground that determination of the fee amount should have been submitted to the trier of fact—here, the jury.

In a detailed ruling, the trial court granted the motion in part and denied it in part. It reasoned that because attorney fees recoverable under *Brandt* (*Brandt* fees) are "damages" incurred in collecting policy benefits, "the right to recover them ends when the evidence has been presented and the jury goes out." Because the jury went out on the

punitive damages phase of trial on October 15, 2007, the trial court ruled that *Brandt* fees would not be recoverable after that date. The trial court further ruled that PBC had waived its right to collect any fees incurred before September 23, 2007 by not presenting those amounts to the jury. It further ruled that costs which had been included in the motion should have been requested through a memorandum of costs pursuant to Code of Civil Procedure section 1033.5. With respect to the balance of the motion, the trial court deemed PBC's evidentiary showing inadequate and ordered PBC "to submit evidence detailing the attorneys fees and non-1033.5 expenses incurred during this time period [September 23 through October 15, 2007] in prosecuting the claim for policy benefits, and excluding fees and costs incurred in pursuing the bad faith claim."

In January 2008, PBC submitted a second motion which requested an award of attorney fees in the amount $193,934.50 incurred prior to September 23, 2007 and through January 2008. The trial court denied the motion without prejudice, allowing PBC one last time to comply with its order. It expressly reaffirmed its prior order that attorney fees incurred before September 23, 2007 were not recoverable. It likewise reaffirmed its prior order that fees incurred after October 15, 2007 were not recoverable, particularly in light of counsel's stipulation concerning how PBC intended to proceed with its fee request. Finally, it determined that PBC's evidentiary showing remained inadequate, explaining that "[t]hough it may be a daunting task to apportion what percentage of a day's work was done on the claim for policy benefits as distinguished from the bad faith claim, this effort must be undertaken to comply with the law as well as the court's orders. Normally, PBC would have had to present its evidence to the jury; the fact that the determination is being made by the court does not relieve PBC of the obligation to prove its claim."

In February 2008, PBC sought reconsideration of the trial court's most recent order and separately moved "for attorneys' fees through January 31, 2008." It requested an award of attorney fees in the amount of $186,016.50 incurred between September 17, 2007 and January 31, 2008. In a March 21, 2008 minute order, the trial court denied the motion for reconsideration on the ground that PBC did not present any new or different

facts that were not already before the court or available at the time of the prior ruling. It also denied PBC's third attorney fee motion on the ground that PBC had failed to comply with the trial court's prior order and the court could not determine fees for the time period limited by the court given the breadth of PBC's request.

In April 2008, PBC filed a fourth motion, this time captioned "motion for attorneys' fees through October 15, 2007," and requesting an award of $126,974.50 for fees incurred between September 23 and October 15, 2007. The trial court denied the motion on the ground it had already been heard and previously denied.

Request for Prejudgment Interest.

At a January 12, 2009 status conference, the parties agreed that PBC's compensatory damages award was $307,264.22 after consideration of a setoff for a prior settlement. The parties disputed, however, whether PBC was entitled to postverdict, prejudgment interest, and the trial court directed the parties to submit letter briefs and proposed judgments in support of their respective positions. In its letter brief, PBC requested not only postverdict but also prejudgment interest running from the date it settled the Robinson action; its proposed judgment likewise included both categories of interest. Essex disputed PBC's entitlement to either category of interest and its proposed judgment omitted both categories. In a March 9, 2009 minute order, the trial court stated that after "consideration of the pleadings, evidence and argument of the parties," it would enter the judgment proposed by Essex.

Request to Try the Cause of Action Alleging a Violation of Business and Professions Code Section 17200.

Approximately seven months after the conclusion of trial, PBC filed an ex parte application requesting a status conference and/or trial schedule concerning its cause of action for violation of Business and Professions Code section 17200 (section 17200), which it contended had been neither tried nor resolved. Essex opposed the application on the ground that the trial court had not ordered—nor had PBC requested—either severance

or bifurcation of the section 17200 cause of action, and thus the trial court lacked authority to order any further trial on the claim. The trial court denied the application.

Thereafter, in August 2008, PBC moved for an injunction and disgorgement under section 17200, as well as for class certification. It argued that the evidence adduced at trial supported a favorable ruling on its section 17200 cause of action. In an October 2008 order, the trial court denied PBC's motion. Explaining that it was undisputed that PBC never moved to sever the claim, the trial court rejected PBC's argument that a formal motion was unnecessary because the jury was precluded from adjudicating the cause of action. It reasoned that authority holding a plaintiff is not entitled to a jury trial on a section 17200 cause of action did not suggest that such a claim cannot be tried by a jury. The trial court ruled: "Therefore, PBC's statements to the effect that it was not required to move for bifurcation because the matters had to be tried separately once it was determined a jury would hear the case [are] not accurate. No transcript of any proceeding before Judge Chalfant was presented by PBC to support its argument that the 17200 cause of action would be tried after the jury trial by the Court."[2]

Judgment was entered in March 2009 and this appeal followed.

DISCUSSION

PBC contends that the trial court both misapplied the law and abused its discretion in denying PBC's motion for attorney fees, request for prejudgment interest and application for trial setting. With the exception of PBC's entitlement to postverdict, prejudgment interest, we find no merit to its contentions.

I. The Trial Court Properly Denied PBC's Motion for Attorney Fees.

In *Brandt*, the Supreme Court held that attorney fees "reasonably incurred to compel payment of the policy benefits [are] recoverable as an element of the damages

---

[2] We also denied PBC's petition for writ of mandate and/or prohibition seeking to overturn the trial court's partial grant of a new trial on the ground that the section 17200 cause of action remained pending.

resulting from such tortious conduct." (*Brandt, supra,* 37 Cal.3d at p. 815.) Explaining that such fees are part of the damages proximately caused by the insurer's bad faith, the Court stated: "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort. [Citation.] These fees must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself. What we consider here is attorney's fees that are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." (*Id*. at p. 817.) Further exploring the medical expense analogy, the Court reasoned: "'When a pedestrian is struck by a car, he goes to a physician for treatment of his injuries, and the motorist, if liable in tort, must pay the pedestrian's medical fees. Similarly, in the present case, an insurance company's refusal to pay benefits has required the insured to seek the services of an attorney to obtain those benefits, and the insurer, because its conduct was tortious, should pay the insured's legal fees.' [Citation.]" (*Ibid*.)

Brandt fees are not the same as costs authorized by contract or statute, which are typically determined by the court in a posttrial motion. (*Brandt, supra,* 37 Cal.3d at p. 817; accord, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4; *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 56.) Rather, "[s]ince the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise. [Citation.]" (*Brandt, supra,* at p. 819.) The *Brandt* court characterized a stipulation for a postjudgment allocation of fees as preferable, because "the determination then would be made after completion of the legal services [citation], and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services. [Citations.]" (*Brandt, supra,* at pp. 819–820, fn. omitted; *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 571–572.)

In *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 890, the Court extended *Brandt* and concluded that the reasoning of that case likewise supported the inclusion of witness fees and other litigation expenses as an element of damage. More recently, the court in *Baron v. Fire Ins. Exchange* (2007) 154 Cal.App.4th 1184, 1197–1198 (*Baron*), further extended *Brandt* to permit the recovery of attorney fees incurred by the insured to defend a judgment against the insurer's appeal. The Court reasoned that such fees are part of the detriment suffered by the insured as a result of the insurer's actions, as "[t]he collection of the benefits due is not complete when the insurer resists the judgment by challenging the judgment on appeal." (*Baron, supra,* at p. 1198.) In reaching its conclusion, the appellate court rejected the reasoning of *Burnaby v. Standard Fire Ins. Co.* (1995) 40 Cal.App.4th 787 and *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, both which had denied requests for attorney fees on appeal under *Brandt*. (*Baron, supra,* at pp. 1197–1198.) Rather, the court relied on *Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857 and *McGregor v. Paul Revere Life Ins. Co.* (9th Cir. 2004) 369 F.3d 1099, which had concluded that attorney fees incurred in defending an insurer's appeal were necessary to obtain policy benefits. (*Baron, supra,* at p. 1198.)

Generally, we must affirm an award of attorney fees absent a showing that the trial court clearly abused its discretion. (*Track Mortgage Group, Inc. v. Crusader Ins. Co., supra,* 98 Cal.App.4th at p. 868.) De novo review is required, however, where the matters before the appellate court involve the resolution of pure questions of law, rather than the resolution of disputed facts. (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779–780.) Thus, while we review for an abuse of discretion the trial court's factual determinations made in connection with its denial of PBC's motion for attorney fees, we independently review the trial court's application of *Brandt* and its progeny. On the basis of the particular manner in which PBC elected to have the issue of attorney fees determined, we find no error.

Because *Brandt* fees are an element of damages, the determination of their amount "must be made by the trier of fact unless the parties stipulate otherwise." (*Brandt, supra,*

37 Cal.3d at p. 819; *Campbell v. Cal-Gard Surety Services, Inc., supra*, 62 Cal.App.4th at pp. 571–572; *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 906–907.) Here, at a September 27, 2007 hearing, PBC secured Essex's stipulation to a "hybrid" approach concerning the determination of *Brandt* fees. According to PBC, it intended to submit "99.9%" of its fees to the jury. The remaining "one percent" (or one-tenth of one percent), such as those incurred at trial, PBC asserted it could not "mechanically" present to the jury.[3] Consistent with the stipulated approach, PBC submitted evidence to the jury regarding the attorney fees it had incurred in securing policy benefits, and the jury awarded PBC attorney fees in the amount of $325,999.85 as part of its $682,264.07 compensatory damages award for Essex's bad faith conduct. Thereafter, contrary to the stipulation, PBC sought to recover from the trial court over $250,000 in attorney fees and costs incurred before the jury trial commenced, during trial and after the jury had deliberated. PBC's request amounted to approximately 78 percent of the attorney fees previously requested and awarded, as opposed to the one percent to which Essex had stipulated.

Under these circumstances, we find no error in the trial court's denial of any aspect of PBC's motion. PBC argues that the trial court erred in declining to award attorney fees incurred before September 22, 2007 and not presented to the jury. But the trial court properly relied on the stipulation offered by PBC in determining that PBC waived its right to collect fees for work done prior to September 23, 2007 by not presenting evidence of those fees to the jury. Again, *Brandt* requires that when attorney fees are sought as damages, the determination of their amount must be made by the trier of fact absent a stipulation to the contrary. (*Brandt, supra,* 37 Cal.3d at p. 819.) Here, in connection with the stipulation, PBC indicated that it intended to present all evidence of attorney fees incurred prior to September 22, 2007 to the jury. Counsel stated: "I cut off our fees as of a certain date. They had to tag them [the exhibits] up, which I think was

---

[3] It certainly would have been more helpful to our analysis for PBC to have offered some explanation for its 99 and one percent figures, rather for it to have elected to omit any reference to that aspect of the stipulation in both its opening and reply briefs.

September 22. I, of course, would therefore want everyone understood that any *subsequent* fees I'll submit to the court after the trial if we get that far and it is appropriate." (Italics added.) Because PBC represented that it intended to seek from the trial court recovery of fees incurred subsequent to September 22, 2007, the trial court properly found that PBC waived any right to seek from the court any fees incurred prior to that date. (See, e.g., *American Home Assurance Co. v. Société Commerciale Toutélectric* (2002) 104 Cal.App.4th 406, 430 ["waiver may be express, based on the party's words, or implied from conduct indicating an intent to relinquish the right"].)

Addressing a different aspect of the trial court's ruling, PBC contends that the trial court erred as a matter of law in ruling unrecoverable attorney fees incurred after October 15, 2007, the day the jury began deliberating. The trial court's initial order characterized this issue as one of law, reasoning that because *Brandt* fees are damages, "the right to recover them ends when the evidence has been presented and the jury goes out." But the trial court permitted briefing on the issue in connection with the second motion and thereafter reached the same result on the basis of factual—not legal—considerations. After outlining the parties' respective positions, the trial court ruled: "The outcome of this issue is controlled by the parties[']stipulation to have the court, not the jury, determine Brandt fees. The only fair construction of this agreement is that the court would have the same evidence before it that a jury would have. That is, the court acted as [a] trier of fact for Brandt fees, but only to the same extent as would otherwise occur. This means that Brandt fees, which are damages, are limited by the parties' agreement to those incurred by October 15, 2007, the date the jury went out."[4]

While neither we nor the parties have been able to locate any published authority addressing whether attorney fees incurred during posttrial proceedings are recoverable under *Brandt*, we need not resolve that larger question here. Though we can envision circumstances under which such fees might be properly recoverable, we agree with the

---

[4] In a footnote, the trial court added that it did not intend to resolve the issue of attorney fees incurred on appeal, adding that *Baron, supra,* 154 Cal.App.4th 1184, would be controlling.

trial court that the parties' stipulation precludes their recovery here. "A stipulation is an agreement between counsel respecting business before the court [citation], and like any other agreement or contract, it is essential that the parties or their counsel agree to its terms." (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142.) "Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties." (*Id*. at p. 144; *Bookstein v. Bookstein* (1970) 7 Cal.App.3d 219, 223.) "Stipulations should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice. [Citation.]" (*Bookstein v. Bookstein, supra,* at p. 223.)

We agree with the trial court that the only reasonable construction of the parties' stipulation is that PBC intended to submit evidence to the jury regarding the attorney fees it had incurred up to commencement of trial and then to submit evidence to the trial court of any potentially recoverable attorney fees incurred during the jury trial. This construction is consistent with PBC's representation that "99.9%" of its fees would be determined by the jury, while the remaining percentage would be determined by the trial court because "I can't mechanically get them to go." PBC's assertion that it reserved its right to seek recovery of fees beyond those incurred before the jury is patently inconsistent with its representations concerning the limited scope of any outstanding fees it intended to seek. Moreover, it was only after PBC clarified that it sought a hybrid approach because of the mechanical difficulties associated with presenting its remaining "[o]ne percent" of its outstanding fees to the jury that Essex acquiesced to the approach. As noted in *Bookstein v. Bookstein, supra,* 7 Cal.App.3d at page 223: "It is not the province of the court to add to the provisions of a stipulation, to insert a term not found therein, or to make a new stipulation for the parties. [Citation.]" The only reasonable interpretation of the stipulation is that PBC intended to present to the court for determination any attorney fees it incurred during the course of the jury trial. Recovery of attorney fees for posttrial proceedings exceeded the scope of the stipulation.

We are mindful of the procedural difficulties that PBC suggests are imposed by *Brandt* and illustrated by this case. According to *Brandt*, absent a stipulation, the

determination of recoverable fees must be made by the trier of fact. (*Brandt, supra,* 37 Cal.3d at p. 819; *Vacco Industries, Inc. v. Van Den Berg, supra,* 5 Cal.App.4th at p. 56.) But in some instances, an insured may continue to incur attorney fees to secure payment of policy benefits even after the jury returns a verdict and, in turn, the insured may seek to characterize those fees as part of the detriment proximately caused by the insurer's conduct. The question becomes how a determination of any damage would be made, given the insured's inability to present those postverdict fees to the jury as the trier of fact. Though not available to PBC in this matter in view of its stipulation, one answer might be found in the *Brandt* court's comparison of attorney fees recoverable as damages to medical expenses recoverable in a personal injury action. (*Brandt, supra,* at p. 817.) In those actions, plaintiffs frequently present evidence regarding the amount of medical expenses likely to be incurred in the future. (See, e.g., *Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 856–857; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 970, fn. 2.) We see no reason why a party seeking recovery of *Brandt* fees could not utilize the same approach and offer evidence not only of attorney fees already incurred but also those reasonably anticipated to be incurred through completion of the action. The determination of any recoverable amount would remain with the jury as the trier of fact "to apply its collective experience, common sense, and diverse backgrounds." (*Abbott v. Taz Express, supra,* at p. 857.)

Addressing PBC's two remaining challenges to the denial of its motion for attorney fees, we see nothing arbitrary about the trial court's determination to deny PBC's two final iterations of its request in part on the ground that PBC had failed to comply with the court's prior orders. A trial court has discretionary power and authority to enforce its own orders and to administer orderly proceedings before it. (Code Civ. Proc., § 128; *Green v. Uccelli* (1989) 207 Cal.App.3d 1112, 1119.) The trial court did not abuse its discretion in denying PBC's motion for the reason that PBC failed to comply with its unambiguous previous orders and instead continued to seek attorney fees for time periods beyond what the court had permitted.

Finally, the trial court did not err in requiring PBC to provide evidentiary support for its request to recover costs pursuant to *Brandt*. Though PBC characterizes the trial court's action as declining, as a matter of law, to award costs otherwise recoverable under Code of Civil Procedure section 1033.5, the trial court's orders were premised on PBC's inadequate evidentiary showing. Initially, the trial court found "no evidentiary support" for some of PBC's cost requests, specifying $2,135 for a transcript, $43,508.75 for fees and costs from one law firm and $7,956 in fees and costs from another firm. It further ruled that "although costs can be part of the damages awarded under Brandt, there can be no overlap between expenses awarded as Brandt damages and allowable costs under CCP section 1033.5, which must be claimed by filing a memorandum of costs. PBC has made no effort to distinguish between the two categories of expenses." Accordingly, the trial court directed PBC "to submit evidence detailing the attorneys fees and non-1033.5 expenses incurred" and to file a separate memorandum of costs to seek expenses covered by Code of Civil Procedure section 1033.5.

PBC failed to comply. After repeating its directive to PBC to submit evidence supporting its attorney fee and cost request, the trial court ruled that "PBC has submitted only a conclusory declaration to support the amount claimed (approximately $147,000), without any discussion as to how that sum was determined . . . ." The next two orders similarly found that PBC had failed to comply with the trial court's initial order.

On appeal, PBC has likewise failed to offer evidentiary support for its claim that the trial court erred in declining to award costs. Though the trial court did not award PBC all costs it sought in its memorandum of costs filed pursuant to Code of Civil Procedure section 1033.5, PBC has made no effort to identify what costs were excluded or to argue what specific costs should have been awarded pursuant to *Brandt*. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

Similarly, PBC has made no effort to demonstrate that it offered sufficient evidence to enable the trial court to determine what costs were recoverable as incurred in securing policy benefits. By way of example, PBC points to the expert witness costs it

incurred in securing the testimony of underwriting expert Andrew Barile and asserts on appeal that such costs were recoverable because Mr. Barile testified about coverage issues. But below, PBC submitted Mr. Barile's bill which included broad notations such as "reading documents," "trial preparation" and "testifying at trial," together with an attorney declaration that nowhere described the substance of Mr. Barile's pretrial preparation or trial testimony. We agree with the trial court's determination that PBC's evidentiary showing was inadequate, as PBC failed to show how the total sum it requested was determined or how it made any deductions for pursuit of its bad faith claim. The trial court acknowledged that it may be "a daunting task to apportion what percentage of a day's work was done on the claim for policy benefits as distinguished from the bad faith claim," but ruled that such an effort was necessary under *Brandt* and its prior order. Because PBC never undertook that effort, the trial court properly denied the cost aspect of the motion.

II. PBC was Entitled to Prejudgment Interest From the Date of the Verdict.

In January 2009, the trial court directed the parties to submit proposed judgments and to provide briefing on the issue of whether PBC was entitled to prejudgment interest on compensatory damages between the date of the verdict and entry of judgment. While PBC urged that it was entitled to prejudgment interest from the time it paid $250,000 to settle the Robinson action or, at minimum, from the date of the verdict, Essex disputed that PBC was entitled to any form of prejudgment interest. The trial court agreed with Essex's position and declined to award prejudgment interest as part of the judgment. To the extent that the prejudgment interest issue concerns application of statutes or rules, we review de novo the trial court's ruling denying prejudgment interest. (See *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; *KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390–391; *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798.)

PBC sought an award of prejudgment interest under Civil Code section 3287, subdivision (a), which provides in part: "Every person who is entitled to recover

damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. . . ." Civil Code section 3287, subdivision (a) mandates the imposition of prejudgment interest if the statutory requirements are met. (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 935; see also *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828 [the trial court lacks discretion to deny prejudgment interest when the Civil Code section 3287 statutory requirements are met]; *E .L. White, Inc. v. City of Huntington Beach* (1982) 138 Cal.App.3d 366, 378 [same].) The test for recovery of prejudgment interest under Civil Code section 3287, subdivision (a) is whether the defendant actually knows the amount owed or from reasonably available information could have computed the amount. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1789.) Damages are deemed certain when the parties do not essentially dispute the computation of damages. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 354–355; *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) By the same token, "'[t]he statute does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor." [Citations.]' [Citation.]" (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co., supra,* at pp. 354–355; accord, *Great Western Drywall, Inc. v. Roel Construction Co., Inc.* (2008) 166 Cal.App.4th 761, 767.)

Preliminarily, we reject PBC's argument that it was entitled to prejudgment interest running from the date it paid $250,000 to settle the Robinson action. Though PBC contends that its damages became certain on the date of payment, it settled the Robinson action and tendered payment without Essex's consent. Where an insurer """erroneously denies coverage and/or improperly refuses to defend the insured" in violation of its contractual duties, "the insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover

the amount of the settlement. . . .' [Citation.]' (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791.)" (*Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958, 984.) Essex disputed whether the settlement was reasonable. Accordingly, as part of its determination of Essex's liability, the jury necessarily determined that the $250,000 settlement payment was reasonable. (See *Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 966 ["Except where there is no room for a reasonable difference of opinion, the reasonableness of an act or omission is a question of fact, that is, an issue which should be decided by a jury"]; *Robinson v. City and County of San Francisco* (1974) 41 Cal.App.3d 334, 337 ["Where evidence is fairly subject to more than one interpretation, the question of *reasonableness* is a triable factual issue for the jury to decide"].) Thus, because PBC's damages were not ascertainable in the absence of a reasonableness determination by the jury, PBC was not entitled to prejudgment interest from the date of that payment under Civil Code section 3287, subdivision (a).

We reach a different conclusion, however, with respect to an award of prejudgment interest running from October 11, 2007, the date of the jury verdict, to March 7, 2009, the date judgment was entered. As of October 11, 2007, PBC was entitled to prejudgment interest under Civil Code section 3287, subdivision (a) because its damages were certain on the date the jury returned its verdict. (*Holdgrafer v. Unocal Corp., supra,* 160 Cal.App.4th at p. 935 [holding that the payment of prejudgment interest runs from the date that damages are certain or capable of being made certain, and "damages are rendered certain on the date that the jury's verdict awarding such damages is entered"]; *Espinoza v. Rossini* (1967) 257 Cal.App.2d 567, 569 ["When a verdict or decision . . . is rendered, regardless of whether any interest by specific provision is included, the award bears interest at the legal rate of 7 percent for the interim period following verdict or decision until entry of judgment"].) That the trial court later applied a prior settlement to offset a portion of the jury's award did not render the jury's verdict any less certain for the purpose of a prejudgment interest award. (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 409.)

In support of its position that PBC was not entitled to prejudgment interest, Essex relies on *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515 (*Pellegrini*). There, the court held that construing California Rules of Court, rule 3.1802,[5] to require the imposition of interest between the verdict and judgment would conflict with Code of Civil Procedure section 685.020, subdivision (a). Rule 3.1802 states: "The clerk must include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict." Effective January 2007, rule 3.1802 was modeled after former rule 875, which provided: "The clerk shall include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict." In turn, Code of Civil Procedure section 685.020, subdivision (a) provides: "Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment."

To reconcile these provisions to resolve the question of whether interest began to run at the time of the verdict or entry of judgment, the *Pellegrini* court explained: "We read rule 3.1802 of the California Rules of Court as directing the clerk to calculate the continuation of any *prejudgment* interest that may have been awarded from the date of the verdict through the date of the judgment. Were we to construe California Rules of Court, rule 3.1802 as providing that *postjudgment* interest accrues between verdict and judgment, it would conflict with Code of Civil Procedure section 685.020. A rule of court cannot take precedence over a statute, however, so we decline to construe California Rules of Court, rule 3.1802 in that fashion." (*Pellegrini*, *supra*, 165 Cal.App.4th at pp. 532–533.) The court further declined to apply prior decisional law requiring that a damages award bear interest during the period following rendition of the verdict or decision and until entry of judgment. (*Id*. at p. 533.) It reasoned that prior case law was based on a requirement in former Code of Civil Procedure section 1033 and

---

5 Unless otherwise indicated, all further rule citations are to the California Rules of Court.

determined there was no equivalent statutory provision currently in effect. (*Pellegrini, supra,* at p. 533.)

In its determination of whether there was any statutory authority for the imposition of interest on a verdict, the *Pellegrini* court focused on postjudgment interest provisions; nothing in the *Pellegrini* decision touched on the effect of Civil Code section 3287, subdivision (a). "'"It is axiomatic that cases are not authority for propositions not considered."' [Citations.]" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127.) Whether interest should run on a verdict is determined by provisions relating to prejudgment, not postjudgment, interest. Indeed, as part of the Enforcement of Judgments Law, Code of Civil Procedure section 685 is not intended to address prejudgment interest. (Code. Civ. Proc., § 685.110 ["Nothing in this chapter affects the law relating to prejudgment interest"]; see also 8 Witkin, Cal. Procedure (5th ed. 2008) § 42, p. 83 ["The provisions of C.C.P. 685.010 et seq. do not affect the law relating to prejudgment interest"].) For these reasons, we conclude that *Pellegrini* is not controlling. Rather, because damages were certain as of the date of the jury verdict, PBC was entitled to prejudgment interest pursuant to Civil Code section 3287, subdivision (a), as of that date.[6]

---

[6] We reject Essex's alternative argument that PBC's interest request was untimely. In *North Oakland Medical Clinic v. Rogers, supra,* 65 Cal.App.4th at pages 829 to 831, the court held that a prejudgment interest request made after all posttrial motions, after a request for costs was filed and well after entry of judgment was too late. Here, the trial court specifically directed the parties to address the issue of prejudgment interest in letters briefs filed in conjunction with their proposed judgments and the parties complied. In the absence of any showing of prejudice, we decline to find that the procedure employed by the trial court conflicted with earlier time frames recommended in *North Oakland Medical Clinic v. Rogers, supra,* at page 831.

III. PBC's Failure to Seek a Separate Trial of Its Cause of Action Under Business and Professions Code Section 17200 Supported the Trial Court's Denial of PBC's Motion Seeking Relief on That Claim.

Following the October 2007 jury verdict, the parties engaged in multiple proceedings before the trial court, including moving for a directed verdict, new trial and judgment notwithstanding the verdict; briefing the issue of coverage for a court trial; moving for recovery of additional *Brandt* fees and making numerous challenges to the trial court's rulings on that issue; moving for a setoff pursuant to Code of Civil Procedure section 877; and initiating appeals. Not once during those proceedings did PBC raise the issue of its claim under section 17200. Then, in May 2008 PBC requested that a "trial" be set on its section 17200 cause of action. It argued that the cause of action "was in effect severed or bifurcated and therefore not tried." Essex countered that PBC's failure to request that any trial on the section 17200 cause of action be severed or bifurcated, coupled with the absence of any court order requiring severance or bifurcation, mandated the denial of PBC's request. The trial court denied PBC's initial application, as well as a subsequent application seeking an injunction and disgorgement, and class certification. It ruled that PBC was required to file a formal request for bifurcation in order to have the trial court adjudicate its claim—either independently or on the basis of the evidence presented to the jury.

We agree. Preliminarily, we observe that the question of whether a party may try a section 17200 claim before a jury does not dispose of the issue before us. In *Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284 (*Hodge*), the court held that a party seeking relief for a violation of section 17200 is not entitled to a jury trial because "the UCL provides only for equitable remedies. 'Prevailing plaintiffs are generally limited to injunctive relief and restitution.' [Citations.] Damages are not available. [Citations.] [¶] Thus, the UCL is not simply a legislative conversion of a legal right into an equitable one. It is a separate equitable cause of action." (*Hodge, supra*, at p. 284.) To refute PBC's contention that it had no obligation to seek a separate trial of its section 17200 claim, the trial court construed *Hodge* to hold that a plaintiff does not have the right but

retains the ability to try a section 17200 claim before a jury. But in our view, the presence or absence of PBC's ability to try its section 17200 before the jury does not affect PBC's obligation to comply with applicable procedural requirements. The record here unambiguously shows that PBC neither tried its section 17200 claim to the jury nor timely sought a separate trial of the matter before the trial court.

Code of Civil Procedure section 598 provides in relevant part that "[t]he court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case . . . . The court, on its own motion, may make such an order at any time." Applicable local rules confirm that a motion seeking a separate trial of an issue must be heard at least 10 days before the trial date. (L.A. Sup. Ct. rule 7.9(h); Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter 2009) ¶ 4:402, pp. 4-92.1–4-93.) Similarly, Code of Civil Procedure section 1048, subdivision (b) provides: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States."

These provisions afford trial courts broad discretion. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504.) Accordingly, we review a trial court's severance determination for an abuse of discretion. (*National Electric Supply Co. v. Mount Diablo Unified School Dist.* (1960) 187 Cal.App.2d 418, 422.) In view of the provision in Code of Civil Procedure section 598 that a court may order severance on its own motion, appellate courts have allowed trial courts significant leeway with respect to the timing of a severance order. For example, the court in *Grappo v. Coventry Financial*

Corp., supra, at pages 503 to 504, found that the trial court acted within its discretion in setting the order of the issues to be tried at the beginning of trial, despite the absence of a formal motion and only a "suggestion" by counsel as to the order of proof. The appellate court in *Buran Equipment Co. v. H & C Investment Co.* (1983) 142 Cal.App.3d 338, 343–344, likewise found that the trial court acted within its discretion when it interrupted the presentation of evidence to determine the adequacy of a notice issue as a matter of law, following a stipulation by the parties that notice was dispositive of a key issue in the case.

But we have found no authority—nor have the parties directed us to any—that would permit an implicit severance order in the face of silence on the matter from both trial counsel and the court throughout the course of the trial. Nor have we found any basis for a trial court to order severance under either Code of Civil Procedure section 598 or 1048 after the trial in the matter has concluded. PBC failed to request and the trial court did not issue an order severing PBC's section 17200 claim at any point before or during the jury and court trial. Rather, PBC made its first request for severance seven months after the jury verdict. The trial court properly exercised its discretion in denying PBC's untimely request.

DISPOSITION

The orders denying PBC's motion for attorney fees and declining to set a trial on its section 17200 cause of action are affirmed. The order denying PBC an award of prejudgment interest is reversed and the matter is remanded with directions to the trial court to calculate the amount of prejudgment interest owing from the date of the verdict to entry of judgment, and to modify the judgment to reflect that amount. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ